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TROPICAL PROFILE SDN BHD

v.

KERAJAAN MALAYSIA JABATAN KERJA RAYA MALAYSIA & ORS

B

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: MT1-24-357-2005]
29 MARCH 2007

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CIVIL PROCEDURE: *Striking out - Appeal against striking out - Plaintiff's originating summons struck off on grounds of no privity of contract with defendant - Whether plaintiff's averments of trust and estoppel exceptions to said doctrine - Whether averments thereof merited a* D *full hearing - Rules of the High Court 1980, O. 18 r. 19(1)*

This was the plaintiff's appeal against the decision of the learned registrar who had allowed the application by the first defendant to strike out the plaintiff's amended originating summons ('OS') under O. 18 r. 19(1) of the Rules of the High Court 1980 ('RHC'). The E plaintiff sought to recover payments due under a project from the second defendant. Hence, the plaintiff's OS was struck off on the grounds that there was no privity of contract between the plaintiff and the first defendant. In this instance, the learned judge took into consideration the plaintiff's averments that the first defendant, F at a meeting, had agreed to make the relevant payments to the plaintiff and to hold payments to the second defendant on trust for the plaintiff.

Held (allowing the appeal):

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(1) The plaintiff's averment of estoppel in the OS was capable of giving rise to a reasonable cause of action. Estoppel is a flexible principle by which justice is done according to the circumstances. It is a doctrine of wide utility and is not H confined to the defendants alone as plaintiffs may have recourse to it in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action. (para 25)

I **(2)** The doctrine of privity of contract establishes the principle that a person who is not a contracting party does not have the contractual right to sue on the contract. This is because the law does not generally recognise the rights of a third party

who is a stranger to the contract. However, there are exceptions in special circumstances, eg, agency, assignment or trust. In the present case, the plaintiff's averment of trust in the OS was an exception to the doctrine of privity of contract thereby giving rise to a reasonable cause of action. That averment would merit a full hearing instead of a disposal by way of a summary procedure under O. 18 r. 19(1)(a) RHC. (paras 26, 27, 28 & 29)

(3) It is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19(1)(a) RHC. Summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the fact of it "obviously unsustainable". So long as the pleading disclosed some cause of action or raised some question fit to be decided by the judge, the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleading to be struck out. (para 30)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(dist)***

Hospital Pantai Ayer Keroh Sdn Bhd v. Lu Wei Hong [2005] 4 MLJ 153 HC ***(refd)***

Kepong Prospecting Ltd & Ors v. Schmidt [1968] 1 MLJ 170 ***(refd)***

Mahkota Technologies Sdn Bhd v. Bina Jati Sdn Bhd & Anor (Guaman Sibil No. D1-22-3190-1998) (Unreported) ***(refd)***

Seremban Golf Resort Bhd v. Amerfab Sdn Bhd [2006] 5 CLJ 114 HC ***(refd)***

Stamford Holding Sdn Bhd v. Kerajaan Negeri Johor & Ors [1998] 1 CLJ 960 CA ***(refd)***

Sulisen Sdn Bhd v. Kerajaan Malaysia [2006] 7 CLJ 247 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(a), (2)

For the plaintiff - Miss Maliga; M/s EL Lau & Assoc
For the 1st defendant - Zaliha Mohd Janis SFC

Reported by Usha Thiagarajah

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JUDGMENT

Low Hop Bing J:

Appeal

B **[1]** This is the plaintiff's appeal against the decision of the learned registrar who had on 26 January 2007 allowed the first defendant's application in encl (40) to strike out the plaintiff's amended originating summons in encl (34) with costs, under O. 18 r. 19(1) of the Rules of the High Court 1980.

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Factual Background

[2] The first defendant's application is supported by the affidavit affirmed by the learned senior federal counsel acting for the first defendant, the Government of Malaysia, stating to the effect that D the plaintiff has no reasonable cause of action against the first defendant, as there was no privity of contract between the plaintiff and the first defendant. The first defendant relied on O. 18 r. 19(1)(a).

E **[3]** Order 18 r. 19(2) expressly provides that no evidence shall be admissible on an application under O. 18 r. 19(1)(a) ie, when the application is based on the ground that it discloses no reasonable cause of action.

F **[4]** That being the case, the determination of the question of whether there is a reasonable cause of action has to be arrived at exclusively on the basis of the originating summons, as amended and contained in encl. (34).

G **[5]** The plaintiff's amended originating summons includes a prayer for *inter alia* a declaration that the plaintiff is legally entitled to the sum of RM4,558,617.37 pursuant to the project known as "Cadangan Membina Jalan Raya Durian Tunggal-Paya Rumput Sungai Udang, Melaka" which is the proposed construction of the H Durian Tunggal-Paya Rumput Sungai Udang, Melaka Highway ("the project").

[6] The averments in the plaintiff's amended originating summons may be summarised as follows:

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[7] On 8 August 2001, the first defendant awarded the project to the sixth defendant at a consideration of RM205 million. The sixth defendant is an unincorporated joint venture body formed by the second to the fifth defendants.

[8] On or about 24 October 2001, the sixth defendant appointed the second defendant as subcontractor to carry out a part of the project. The second defendant and the plaintiff then entered into two agreements *viz.*

(1) Agreement dated 15 November 2001 for technical services at a consideration of RM53,574,414.50; and

(2) Letter of Acceptance of Tender dated 17 March 2003 for contract works at a consideration of RM7,461,567.30.

[9] The payments for the above considerations are said to be "back to back" ie, from the first defendant to the sixth defendant to the second defendant and finally to the plaintiff.

[10] Pursuant to the above agreements, the plaintiff had from time to time made claims for and received payments from the second defendant. Pursuant to the letter dated 8 June 2004, the second defendant has agreed and admitted the arrears that ought to be paid to the plaintiff.

[11] At the material time, 98% of the project had been completed, for which relevant payments had been paid by the first defendant to the sixth defendant and the sixth defendant had in turn made payments to the second defendant. Although the second defendant was to make payments to the plaintiff, it had failed, refused and/or neglected to do so.

[12] On or about 14 October 2004, the plaintiff commenced Kuala Lumpur High Court civil action No. S1-22-1570-2004 ("the KL civil action") against the second defendant to recover the said payments. The KL civil action had since been transferred to the Melaka High Court and registered as MT2-22-114-2006.

[13] The second defendant does not have any other development project or asset within the jurisdiction of this court.

[14] *Vide* letter dated 6 December 2004, the first defendant intervened and invited the plaintiff to attend a meeting on 14 February 2004. At the meeting, the first defendant's director of project management and coordination (Group IV) announced that payments for the project which ought to be made *inter alia* to the plaintiff in the project shall be paid by the first defendant direct to the plaintiff.

[15] It was also averred that the first defendant was estopped from making payments *inter alia* to the second defendant, and the balance thereof should be held by the first defendant on trust for the benefit of the plaintiff.

Cause Of Action

[16] Learned senior federal counsel Miss Zaliha bt Mohd Janis submitted for the first defendant that there was no privity of contract between the plaintiff and the first defendant and so the plaintiff has no *locus standi*, relying on:

(1) *Government of Malaysia v. Lim Kit Siang & Another case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC;

(2) *Mahkota Technologies Sdn Bhd v. Bina Jati Sdn Bhd & Anor* (KL Guaman Sibil No. D1-22-3190-1998, unreported) HC; and

(3) *Sulisen Sdn Bhd v. Kerajaan Malaysia* [2006] 7 CLJ 247 HC.

[17] Miss Maliga, plaintiff's learned counsel, responded that the plaintiff has a reasonable cause of action against the first defendant and the plaintiff's amended originating summons should not be struck out, seeking support in:

(1) *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC; and

(2) *Stamford Holding Sdn Bhd v. Kerajaan Negeri Johor & Ors* [1998] 1 CLJ 960 CA.

[18] On my part, the usefulness or otherwise of the authorities cited for the first defendant deserves consideration now.

[19] In *Lim Kit Siang, supra,* the High Court judge dismissed the application by the defendants *viz* United Engineers (M) Bhd ("UEM") and the Government of Malaysia to strike out the plaintiff's suits on the grounds *inter alia* that it disclosed no

reasonable cause of action and no *locus standi*. On appeal, the then Supreme Court found nothing in the plaintiff's statement of claim which shows that the plaintiff has a legal relationship with UEM which would indicate the existence of any legal right or duty between them. In the circumstances, the plaintiff's suits were unmaintainable and struck out by the Supreme Court under O. 18 r. 19(1)(a).

[20] It is not difficult to see the distinguishable features between *Lim Kit Siang, supra,* and the instant case wherein the plaintiff's amended originating summons in encl (34) contains *inter alia* averments that the first defendant's director of project management and coordination had announced that payments for the project which ought to be paid to *inter alia* the plaintiff shall be paid by the first defendant to the plaintiff and that first defendant was therefore estoppel from making payments to the second to sixth defendants, and the balance thereof should be held by the first defendant on trust for the benefit of the plaintiff.

[21] The plaintiff's above averments cannot be said to be lacking in the creation of a legal and/or equitable relationship between the plaintiff and the first defendant. While generally no privity of contract may have existed between the plaintiff and the first defendant, the aforesaid averments by the first defendant would certainly attract the application of the doctrine of estoppel, and the alleged existence of a trust for the benefit of the plaintiff. These two essential averments were absent in *Lim Kit Siang, supra.*

[22] I shall deal with the issues of estoppel and trust later in my judgment.

[23] In *Mahkota Technologies, supra,* the plaintiff's statement of claim did not show any collateral contract being established nor was there any privity of contract. That being the case, Vincent Ng Kim Khoay J had no difficulty in allowing the second defendant's application to strike out the plaintiff's claim against the second defendant. Again, the facts there did not raise the issues of estoppel and trust which had been averred in the plaintiff's amended originating summons herein.

[24] The judgment of Abdul Malik Ishak J in *Sulisen Sdn Bhd, supra,* was delivered after evidence was adduced in a full trial and is not even remotely relevant to an application under O. 18 r. 19(1)(a). The learned senior federal counsel's reliance on this authority is misconceived.

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Estoppel

[25] The plaintiff's averment of estoppel in the amended originating summons is capable of giving rise to a reasonable cause of action. In this regard, a clear and concise statement has been
B made by the Federal Court through the judgment of Gopal Sri Ram JCA in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 to the effect that it is a flexible principle by which justice is done according to the circumstances; it is a doctrine of wide utility and is not confined
C to the defendants alone, as plaintiffs may have recourse to it in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.

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Privity Of Contract And Trust

[26] As a general rule, a person who is not a contracting party does not have the contractual right to sue thereon since the law does not generally recognize the rights of a third party who is a stranger to the contract. This principle is known as the doctrine
E of privity of contract.

[27] However, exceptions do arise in special circumstances eg, agency, assignment or trust. The plaintiff herein has averred the existence of trust in the amended originating summons, thereby
F revealing a reasonable cause of action as an exception to the doctrine of privity of contract.

[28] Interestingly, where privity of contract has been raised eg, in an application for summary judgment, our courts have resolved the
G issue by way of a full trial, instead of the summary procedure (see *Kepong Prospecting Ltd. & Ors. v. Schmidt* [1968] 1 MLJ 170 JCPC; *Hospital Pantai Ayer Keroh Sdn Bhd v. Lu Wei Hong* [2005] 4 MLJ 153 HC; and *Seremban Golf Resort Bhd v. Amerfab Sdn Bhd* [2006] 5 CLJ 114 HC).

H **[29]** By analogy, the averment of trust in the plaintiff's amended originating summons would merit a full hearing instead of a disposal by way of a summary procedure under O. 18 r. 19(1)(a).

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Order 18 r. 19 Principles

[30] The principles governing an application under O. 18 r. 19(1) are trite. The *locus classicus* is to be found in *Bandar Builder Sdn Bhd & Ors, supra,* where the then Supreme Court speaking through Mohamed Dzaiddin SCJ (later CJ Malaysia) set out the principles in essence as follows:

(1) It is only in plain and obvious cases that recourse should be had to the summary process under this rule and summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it "obviously unsustainable".

(2) So long as the pleading disclosed some cause of action or raised some question fit to be decided by the judge, the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleading to be struck out.

[31] In *Stamford Holdings Sdn Bhd, supra,* Ahmad Fairuz JCA (now CJ Malaysia) delivered judgment for the Court of Appeal and held *inter alia* as follows:

(1) So long as the statement of claim discloses some cause of action, the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out.

(2) The court would assume that the contents of the statement of claim to be true in the absence of defence being filed by the respondent.

Conclusion

[32] On the foregoing grounds, I hold that the learned registrar has erred in dismissing the plaintiff's amended originating summons against the first defendant. Hence, I allow this appeal with costs, set aside the order of the learned registrar and reinstate the plaintiff's amended originating summons.

[33] I also make a consequential interim order that the money currently held by the first defendant shall continue to be so held pending the hearing and disposal of the plaintiff's application relating to the same subject matter.